

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 10147 of 2003
with
CRIMINAL MISC.APPLICAION NO.76 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

VISHAL MOTISING VASAVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 10147 of 2003
MR MA KALATHIL for Petitioner No. 1
Mr.Kogje, Addl.PUBLIC PROSECUTOR for Respondent No. 1
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CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 08/01/2004

ORAL JUDGEMENT

With the consent of learned advocate for the petitioner Mr.Kalathil and the Ld.APP Mr.Kogje, main matter for quashing is taken up for final hearing today.

2. The short facts of the case appear to be that earlier DNA test of the petitioner was undertaken and it has been stated that the DNA test was found to be in negative. When the evidence is recorded, it is the case of the original complainant that she came to know at a later point of time that the DNA test is already undertaken of the petitioner accused and therefore she moved an application-Exh.94 before the learned trial judge for conducting second DNA test of the petitioner and the child, namely, Piyush, who is aged two years old at the time of application. The original complainant in the said application also insisted that she wants to have DNA test at the laboratory situated at Hyderabad only and the learned Sessions Judge ultimately after hearing both the sides allowed the application of the original complainant being Exh.94 and directed for the second DNA test to be conducted. The learned counsel for the petitioner apprehends that based on the aforesaid order passed below application-Exh.94 dated 24.11.2003 the petitioner will be compelled to travel to Hyderabad with the original complainant and the parents of the complainant and the petitioner further apprehends that the safety of the petitioner will be in jeopardy if the petitioner is compelled to go to Hyderabad for conducting of DNA test which is at Hyderabad. It is under these circumstances, the petitioner has approached this court by the present petition.

3. Initially, the petitioner has preferred Misc.Cr.A No.10147/03 for quashing of the said order and since it has been apprehended by the petitioner that the petitioner who is otherwise in judicial custody will be handed over to the complainant and the parents of the complainant for conducting the said DNA test at Hyderabad has preferred Cr.M.A.No.76/04 for interim stay against the said order, dated 25.11.2003 passed by the learned Sessions Judge.

4. When the matter was taken up for hearing. Mr.Kalathil, after some arguments, fairly submitted that as per Science, even if the second DNA test is conducted, merely because the period of two years has expired the result of test is not likely to be changed and therefore the petitioner has no objection if the second DNA test is conducted, but the main objection of the petitioner at this stage is that if the petitioner is compelled to travel upto Hyderabad with the complainant and the

parents of the complainant without the presence of the advocate for the petitioner the safety of the petitioner may be in jeopardy and therefore Mr.Kalathil submitted that if this court while considering the matter for examining the legality and validity of the order of the learned sessions judge modifies the order to the extent that the said DNA test may be conducted at any hospital in Gujarat State, the petitioner would have no objection to said test being conducted reserving liberty to raise all the contentions available under law before the learned Sessions Judge on the question of acceptance of DNA test or otherwise at the time of final conclusion of the trial.

5. The Ld.Addl.PP Mr.Kogje submitted, inter alia, that if second DNA test is ordered by this court in any place in Gujarat, the State will make appropriate arrangement for keeping the petitioner present for such test since he is in judicial custody.

6. Having considered the above and the order, dated 25.11.2003 passed by the learned Sessions judge, it appears that the order passed by the learned sessions for allowing second DNA test to be conducted of the petitioner can not be said without jurisdiction or illegal which would cause any great injustice to the party. As such, the order can be said to be discretionary order which would not call for interference by this court. I find it proper not to observe further and leave it at that stage, more particularly, in view of the fair stand taken by the learned advocate for the petitioner that the petitioner has also no objection for second DNA test to be conducted at any hospital in Gujarat State.

7. So far as the insistence of the original complainant for getting the DNA test to be conducted at Hyderabad only and not at any other place and acceptance of such request by the learned sessions judge in the impugned order, deserves interference. The complainant may be justified at the most in insistence for second DNA test to be conducted. However, such insistence can not be stretched to the extent of getting the test conducted at a particular laboratory of the choice of the complainant. If such contentions at the instance of the complainant are accepted, it may leave room to large number of other manipulations and complications. It will be for the State to modulate and regulate such procedure to be undertaken since it will be the duty of the State to ensure that the criminal justice is properly administered in the State. The State for various reasons

may decide to get such test to be conducted at the nearest laboratory or in an appropriate case the court may direct the State to get such test conducted at a particular laboratory, but certainly the complainant can not be said to have any vested right to get such test conducted at a particular laboratory only. Further, no extraordinary circumstances are recorded by the learned sessions judge for accepting the contention of the original complainant to get DNA test conducted at Hyderabad only. It has not come on record that the laboratories for conducting DNA test situated in Gujarat are either not useful or the report may create a doubtful situation. In absence of such material on record, in my view, the learned sessions judge has committed error in accepting the contention of the original complainant that the DNA test shall and must be conducted at a laboratory situated at Hyderabad only.

8. In view of the aforesaid discussion, the order dated 25.11.2003 passed by the learned sessions judge below application-Exh.94 in Sessions Case No.36/02 shall operate to the extent of ordering the second DNA test of the petitioner by comparing the blood of the child-Piyush. However, the order shall stand modified to the extent that such DNA test shall be conducted at any laboratory situated in Gujarat State. It will be for the learned sessions judge to decide after hearing both sides for the place of the laboratory anywhere in Gujarat. As and when such test will be conducted for the purpose of blood sample or otherwise, the State shall make arrangements for ensuring that the petitioner is kept present personally for such purpose and the petitioner shall be at liberty to keep his advocate present at the time when blood samples are to be collected. The original complainant shall also be at liberty to remain present either with her parents or advocate of her choice.

9. Cr.M.A.No.10147/03 is allowed to the aforesaid extent only. Rule is made absolute accordingly.

10. In view of the order in Cr.M.A.N.10147/03 no order is required to be passed in Cr.M.A.No.76/04. Cr.M.A.No.76/04 stands disposed of accordingly.

11. Mr.Kalathis, ld.advocate for the petitioner shall be at liberty to communicate this order to the learned sessions judge since the matter is kept tomorrow

(9.1.2004).

DS permitted.

8.1.04 (JAYANT PATEL, J)